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Public Prosecutor v Mohd Noor bin Shafie

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HIGH COURT (KOTA BHARU) — CRIMINAL APPEAL NO 45A-1–1 OF 2015
AHMAD BACHE JC
30 SEPTEMBER 2016

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Criminal Procedure — Acquittal or discharge — Acquittal of accused without calling upon defence — Drug trafficking charge — Prosecution failed to exclude accessibility of drugs in question to other persons — Whether evidence showed drugs found in house raided by police were accessible to several persons — Whether prosecution failed to establish prima facie case — Whether adverse inference had to be invoked against prosecution for failure to call material witnesses to testify — Evidence Act 1950 s 114(g) — Whether court had to be cautious of possibility drugs were planted as arrest and detention of accused was based on tip-off

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The accused, Mohd Noor bin Shafie, was charged in the High Court with trafficking in 213.9g of heroin, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The heroin was found contained in several bottles kept inside two plastic bags in the kitchen of a house when police raided the premises based on a tip-off. During the raid, police arrested three persons who were in the house — the accused, SP9 and another person named Zakuwan. Initially, the three were jointly charged for the offence in the magistrate's court but when the matter was transferred to the High Court, the prosecution decided to only charge the accused on the premise he allegedly stayed at the house and that the heroin belonged to him. During the raid, the police party confiscated seven mobile phones from the house. At the time, there were also two motorcycles and a car (not registered under the names of any of the arrested persons) parked in the porch of the house. At the trial, the owner of the house, SP4, testified that she had rented her house to a person named Zahid and that she never met nor knew the accused. SP4 said she instructed Zahid to pay the monthly rentals to her neighbour, SP3. SP3 testified that he had often seen many people coming to the house, including the accused, and that a woman and her child had also been staying there. SP3 said that on the night of the raid, when the police party entered the house forcefully through the front door, he heard the sound of broken glass coming from the back of the house. SP4 confirmed that the glass windows at the back of the house had been broken. According to SP9, who was called as a witness for the prosecution, Zahid was in the house at the time of the raid but he escaped through the back of the house. He was subsequently arrested by police for drug-related activities.

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Held, acquitting and discharging the accused without calling for his defence:

(1) At the end of the prosecution's case, the court, after subjecting all the evidence adduced to a maximum evaluation, found that the prosecution had failed to establish a prima facie case. The accused was acquitted and discharged without calling for his defence, the main ground being that the prosecution had failed to exclude the possibility of access by others to the heroin in question (see para 23).

(2) From the totality of the evidence adduced by the prosecution, the court concluded that the heroin was accessible to many persons — Zahid, who was the actual tenant of the house but who was not called by the prosecution to testify; Zakuwan, who was also not called to testify; the many friends of Zahid who frequented the house and who were also not called as witnesses; SP9 himself; the woman and the child, who were also not called to give evidence and the accused himself. It was a settled principle of law that in having to prove its case, the prosecution, and not the accused, had a duty to exclude the possibility of accessibility by other persons to the drugs in question (see paras 22 & 24).

(3) The court found that Zahid was proven not to be a fictitious character. It could be inferred in all probability that the heroin belonged to him. The testimonies of SP3 and SP4 lent credence to SP9's evidence that Zahid was in the house at the time of the raid but he managed to escape from the police through the glass windows at the back of the house (see paras 35–36).

(4) The prosecution's failure to call the investigating officer, ASP Abdullah, to testify had deprived the defence of the opportunity to inquire from him the ownership of the seven mobile phones and the car and motorcycles which were found at the house, all of which, in themselves, proved that there were several other persons who were in the house at the time of the raid, or who had stayed in the house. These facts not only weakened the prosecution's case but strengthened the defence's case and raised an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950 ('the Act') (see para 38).

(5) Zahid, Zakuwan and 'the woman' were persons who had access to the house (apart from the many friends of Zahid). They were not called to testify and this deprived the defence of the opportunity for cross-examination. No reasonable explanation was given by the prosecution for the omission to call those persons as witnesses. As such, this failure raised an adverse inference against the prosecution under s 114(g) of the Act and the defence ought to have the benefit of the prosecution's failure (see para 39).

(6) As the arrest and detention of the accused was based on information received, the court had to be cautious as there was always the possibility that the drugs were planted (see para 37).

[Bahasa Malaysia summary

Tertuduh, Mohd Noor bin Shafie, telah dituduh di Mahkamah Tinggi kerana mengedar heroin seberat 213.9g, satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952. Heroin tersebut telah dijumpai mengandungi dalam beberapa botol yang disimpan dalam dua beg plastik di dapur sebuah rumah apabila polis menyerbu premis tersebut berdasarkan maklumat yang diberikan. Semasa serbuan, polis telah menangkap tiga orang yang berada dalam rumah itu — tertuduh, SP9 dan seorang lain bernama Zakuwan. Pada mulanya, ketiga-tiga orang itu telah dituduh bersama kerana kesalahan tersebut di mahkamah majistret tetapi apabila hal tersebut dipindahkan ke Mahkamah Tinggi, pendakwaan membuat keputusan untuk hanya mengenakan pertuduhan terhadap tertuduh berdasarkan dia dikatakan tinggal di rumah tersebut dan bahawa heroin itu adalah miliknya. Semasa serbuan, pasukan polis telah merampas tujuh telefon bimbit daripada rumah itu. Pada masa itu, terdapat juga dua motorsikal dan sebuah kereta (tidak didaftarkan di bawah nama mana-mana orang yang ditangkap) yang diparkirkan dalam kawasan rumah itu. Semasa perbicaraan, pemilik rumah itu, SP4, telah memberi keterangan bahawa dia telah menyewa rumahnya kepada seseorang bernama Zahid dan bahawa dia tidak pernah berjumpa atau mengenali tertuduh. SP4 menyatakan dia telah mengarahkan Zahid membayar sewa bulanan kepada jirannya, SP3. SP3 telah memberi keterangan bahawa dia seringkali melihat ramai orang datang ke rumah itu, termasuk tertuduh, dan bahawa seorang wanita dan anaknya juga tinggal di situ. SP3 menyatakan bahawa pada malam serbuan itu, apabila pasukan polis memasuki rumah itu secara paksa melalui pintu hadapan, dia mendengar bunyi kaca pecah yang datang daripada belakang rumah itu. SP4 mengesahkan bahawa tingkap kaca di belakang rumah itu telah dipecahkan. Menurut SP9, yang telah dipanggil sebagai saksi untuk pendakwaan, Zahid berada dalam rumah itu pada masa serbuan itu tetapi dia melarikan diri melalui belakang rumah. Dia akhirnya telah ditangkap oleh polis kerana kegiatan berkaitan dadah.

Diputuskan, membebas dan melepaskan tertuduh tanpa memanggil untuk pembelaannya:

(1) Di akhir kes pendakwaan, mahkamah, selepas meletakkan semua keterangan yang dikemukakan kepada penilaian maksimum, mendapati pendakwaan telah gagal membuktikan kes prima facie. Tertuduh telah dibebas dan dilepaskan tanpa dipanggil untuk pembelaannya, alasan utama adalah bahawa pendakwaan telah gagal mengecualikan kemungkinan akses oleh yang lain kepada heroin yang dipersoalkan (lihat perenggan 23).

(2) Berdasarkan keseluruhan keterangan yang dikemukakan oleh pendakwaan, mahkamah memutuskan bahawa heroin boleh diperolehi oleh ramai orang — Zahid, yang merupakan penyewa sebenar rumah itu

tetapi yang tidak dipanggil oleh pendakwaan untuk memberi keterangan; Zakuwan, yang juga tidak dipanggil untuk memberi keterangan; ramai rakan Zahid yang seringkali datang ke rumah itu dan yang juga tidak dipanggil sebagai saksi; SP9 sendiri; wanita dan anak, yang juga tidak dipanggil untuk memberi keterangan dan tertuduh sendiri. Ia adalah prinsip undang-undang bahawa dalam membuktikan kesnya, pendakwaan, dan bukan tertuduh, mempunyai kewajipan untuk mengecualikan kemungkinan boleh akses oleh orang lain kepada dadah yang dipersoalkan (lihat perenggan 22 & 24).

(3) Mahkamah mendapati bahawa Zahid dibuktikan bukan karektor yang direka. Ia boleh dimaksudkan dalam semua kemungkinan bahawa heroin itu adalah miliknya. Keterangan SP3 dan SP4 memberi kepercayaan kepada keterangan SP9 bahawa Zahid berada di rumah tersebut pada masa serbuan tetapi dia berjaya melarikan diri daripada polis melalui tingkap kaca di belakang rumah itu (lihat perenggan 35–36).

(4) Kegagalan pendakwaan memanggil pegawai siasatan, ASP Abdullah, untuk memberi keterangan telah menafikan pembelaan peluang untuk menyoalnya berhubung pemilikan tujuh telefon bimbit dan kereta serta motorsikal yang dijumpai di rumah tersebut, kesemuanya yang mana, dengan sendirinya, membuktikan bahawa terdapat beberapa orang lain yang berada di rumah tersebut pada masa serbuan, atau yang tinggal di rumah tersebut. Fakta-fakta tersebut hanya melemahkan kes pendakwaan tetapi mengukuhkan kes pembelaan dan menimbulkan inferens bertentangan terhadap pendakwaan di bawah s 114(g) Akta Keterangan (lihat perenggan 38).

(5) Zahid, Zakuwan dan 'the woman' merupakan orang-orang yang mempunyai akses kepada rumah tersebut (selain daripada kawan-kawan Zahid yang ramai). Mereka tidak dipanggil untuk memberi keterangan dan ini menafikan pembelaan untuk peluang pemeriksaan balas. Tiada penjelasan munasabah telah diberikan oleh pendakwaan kerana peninggalan untuk memanggil orang-orang tersebut sebagai saksi. Oleh itu, kegagalan ini telah menimbulkan inferens bertentangan terhadap pendakwaan di bawah s 114(g) Akta Keterangan dan pembelaan patut mendapat manfaat daripada kegagalan pendakwaan (lihat perenggan 39).

(6) Oleh kerana tangkapan dan penahanan tertuduh adalah berdasarkan maklumat yang diterima, mahkamah perlu berhati-hati kerana selalu terdapat kebarangkalian yang dadah itu telah sengaja diletakkan di situ (lihat perenggan 37).]

Notes

For cases on acquittal of accused without calling upon defence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 97–101.

Cases referred to

PP v Ang Kian Chai and another appeal [2012] MLJU 158; [2012] 4 MLRA 456, CA (refd)
Azizan bin Yahaya v PP [2013] 1 MLJ 180; [2012] 8 CLJ 405, CA (refd)
Husin bin Sitorus v PP [2012] 3 MLJ 782; [2012] 7 CLJ 205, CA (refd)
Ibrahim Mohamad & Anor v PP [2011] MLJU 1491; [2011] 4 CLJ 113, FC (refd)
Karthi a/l Gopal v PP [2016] 5 MLJ 274, CA (refd)
Lean Siew Boon & Anor v PP [2014] 2 MLJ 572, CA (refd)
Mazlani bin Mansor v PP and other appeals [2014] 2 MLJ 18, CA (refd)
Mohamad b Abdul Rahman v PP [2013] MLJU 1592; [2013] 7 CLJ 843, CA (refd)
PP v Chang Kok Foo [2016] 7 MLJ 67, HC (refd)

Legislation referred to

Criminal Procedure Code ss 112, 173, 180, 180(1)
Dangerous Drugs Act 1952 ss 37(d), 39B(1)(a), (2), First Schedule
Evidence Act 1950 ss 32(1)(i), 114(g)
Penal Code ss 34, 302

Noriah bt Osman (Ainul Wardiah with her) (Deputy Public Prosecutor, Kelantan State Legal Advisory Office) for the prosecution.
Ahmad Nizam bin Mohamad (Alias bin Ibrahim with him) (Alias & Co) for the appellant.

Ahmad Bache JC:

INTRODUCTION

[1] The accused was charged for the offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') in this court.

[2] The charge was as follows:

> Pertuduhan
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> Bahawa kamu pada 14/4/2014, jam lebih kurang 8.50 malam, bertempat di dalam sebuah rumah beralamat 46 Blok D, Perumahan JPN Kampung Getting, di dalam Daerah Tumpat, di dalam Negeri Kelantan telah mengedar dadah berbahaya iaitu 213.9 gram Heroin dan dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah s 39B(2) Akta yang sama.

[3] At the end of the prosecution's case the accused was acquitted and discharged by this court without calling for his defence. Dissatisfied with the

decision, the public prosecutor filed an appeal to the Court of Appeal. These are the grounds for the judgment of this court.

THE FACTS OF THE CASE

[4] On 14 April 2014, at about 8.50pm following information received that there was a suspected drug trafficking activity at a house number 46, Blok D, Perumahan JPN, Kampung Geting, Pengkalan Kubor, Tumpat, Kelantan ('D46'), SP7 (the complainant/arresting officer) had led a raiding team comprising 14 police officers and policemen to ambush the house, which included Corporal Azhar, Corporal Faizalizam ('SP8'), Sargeant Azman and Corporal Adnan.

[5] Upon arrival at the said house, SP7 and his men took their strategic positions as determined earlier at a briefing. According to the testimony of SP7, the house and its surroundings were well-lighted as SP7 approached the house. SP7 could see a Kancil motorcar with the registration No DAT 628, a 'LC' motorcycle with the registration No WKN 16 and another motorcycle with a registration No Narathiwat 45.

[6] From outside the house ('D46'), SP7 had peeped through the 'nako' glass windows and saw three persons in the house. SP7 and his team then forced open the front door of the house, gained entry, and identified themselves, followed by making the arrest of the three persons. According to SP7, before they were arrested, there were scuffles between his team and the three persons. Upon inspection, nothing incriminating was found on the three persons. According to SP7, one of them ie Che Abdul Aziz ('SP9') was arrested in the living room, whereas the other persons ie the accused, and one person by the name of Zakuwan, were arrested in the kitchen area.

[7] In the kitchen, SP7 had found two black plastic bags with small bottles inside them, suspected to be drugs. SP7 then asked the trio (after giving the caution) whether those drugs belonged to any one of them. According to SP7, they were silent, but looked frightened.

[8] Further inspection carried out by SP7 confirmed that the first black bag contained 35 small bottles with yellow caps, each containing white powdery substance. The second black plastic bag contained 150 small bottles with yellow caps, each containing white powdery substance. According to SP7, there was a total of 185 bottles containing white powdery substance, which he suspected to be heroin.

[9] SP7, then, seized those drugs, and brought the trio, to the Narcotics Department at IPD Tumpat, for further investigation.

[10] The drugs were sent to the chemistry department where, upon a laboratory analysis, it was confirmed that the suspected drugs were heroin, as listed under the First Schedule to the Dangerous Drugs Act 1952, with a total nett weight of 213.9g.

[11] The main thrust of the prosecution's case was that the drugs belonged to the accused in view of the fact that he was allegedly staying in the said house where the heroin was found.

DUTY OF THE COURT AT THE END OF THE PROSECUTIONS CASE

[12] The duty of the trial court at the end of the prosecution's case as enunciated by the superior courts through the years, is succinctly encapsulated in the judgment of Judicial Commissioner Collin Sequerah, who had said in the case of *Public Prosecutor v Chang Kok Foo* [2016] 7 MLJ 67 at pp 75–76, paras 12–14, as follows:

> [12] Section 180(1) of the Criminal Procedure Code stipulates the duty of the court at the end of the prosecution case. It reads as follows:
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> 180 Procedure after conclusion of case for prosecution:
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> (1) When the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused.
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> (2) If the court finds that the prosecution has not made out a prima facie case against the accused, the court shall record an order of acquittal.
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> (3) If the court finds that a prima facie case has been made out against the accused on the offence charged the court shall call upon the accused to enter on his defence.
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> (4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.
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> [13] The duty upon the court at that stage has also been the subject of judicial consideration in the cases of *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1; [1999] 2 AMR 2017, *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 2 AMR 89, *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 CLJ 85 and *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203 respectively. They are all united in the stand that they take, and that is that the evidence at the close of the case for the prosecution must be subjected to maximum evaluation in order to determine whether a prima facie case is made out that would justify a court in calling for the defence of the accused. The phrase 'prima facie case' itself has not been statutorily defined in the above section. However, it has been the subject of judicial pronouncement. In the case of Dato' Seri Anwar bin Ibrahim, His Lordship

Augustine Paul J (as he then was) had this to say on the meaning of the phrase 'prima facie case':

> The meaning of prima facie case in s 180(1) of the Criminal Procedure Code must be understood in the context of a non-jury trial. A prima facie case arises where the evidence in favour of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial a maximum evaluation of the credibility of the witnesses must be done at the close of the case against the prosecution before the court can rule that a prima facie case has been made out in order to call for defence. Be that as it may, I am unable to agree with the defence submission that this means that the prosecution must prove its case beyond reasonable doubt at that stage. A case is said to have been proven beyond a reasonable doubt only upon a consideration and assessment of all the evidence (see *Canadian Criminal Evidence* (3rd Ed) ... thus, a prima facie case as prescribed by the new s 180(1) of the Criminal Procedure Code must mean a case which if unrebutted would warrant a conviction.

[14] In *Looi Kow Chai v Public Prosecutor* [2003] 2 MLJ 65, Gopal Sri Ram JCA (as he then was) speaking for the Court of Appeal had this to say: in our respectful view, the correct test to be applied in determining whether a prima facie case has been made out under s 180 of the CPC (and this would apply to a trial under s 173 of the CPC) is that as encapsulated in the judgment of Hashim Yeop Sani FJ (as he then was) in *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 at p 270: to summarise, it would therefore appear that having regard to the prosecution evidence adduced so far, a prima facie case has not been established against Nordin Johan and Aziz Abdullah, the second accused and the fourth accused which, failing their rebuttal, would warrant their conviction. In other words if they elect to remain silent now (which I hold they are perfectly entitled to do even though they are being tried under the Emergency Regulations) the question is can they be convicted of the offence of s 302 read with s 34 of the Penal Code? My answer to the question is in the negative. We are confident in the view we have just expressed because we find nothing in the amended s 180(1) of the CPC that has taken away the right of an accused person to remain silent at the close of the prosecution case. Further we find nothing in the legislative intention of Parliament as expressed in the language employed by it to show that there should be a dual exercise by a judge under s 180 when an accused elects to remain silent as happened in *Pavone v Public Prosecutor* [1984] 1 MLJ 77. In other words we are unable to discover anything in the language of the recently formulated s 180 that requires a judge sitting alone first to make a minimum evaluation and then when the accused elects to remain silent to make a maximum evaluation in deciding whether to convict or not at the close of the prosecution case. It therefore follows that there is only one exercise that a judge sitting alone under s 180 of the CPC has to undertake at the close of the prosecution case. He must subject the prosecution evidence to maximum evaluation and to ask himself the question: if I decide to call upon the

accused to enter his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution case? If the answer is in the negative then no prima facie case has been made out and the accused would be entitled to an acquittal. (Emphasis added).

[13] Thus, in this instant case, this court too, is expected to subject the case of the prosecution to a maximum evaluation of the evidence of all their witnesses at the end of the prosecution's case. This exercise necessarily involves subjecting all the evidence of the prosecution witnesses (including the credibility of its witnesses) to strict scrutiny. If there are any infirmities in the prosecution's case, then the benefit of the prosecution's failure should be given to the defence. Hence, as could be seen in the following paragraphs, this court too had applied the foregoing principles in the analysis that it had carried out at the end of the prosecution's case.

ANALYSIS OF THE EVIDENCE AND FINDING OF THIS COURT

[14] The main evidence of the prosecution, as led by SP3 ('Sidek'), a neighbour, was that the house ('D46') where the heroin was found belonged to SP4 ('the house-owner'), who had rented it out to one 'Zahid', starting in February 2014. SP3 had testified that, at several times, he had seen the accused coming to that house.

[15] SP3 had also testified that, SP4 (the house-owner) had instructed him ('SP3') to collect the rental for the subsequent months, as 'Zahid' had already paid for the first rental, and the deposit, to SP4 directly. SP3 had also testified that, before the raid, he had seen many of Zahid's friends had come in and out of the house '(keluar masuk dari rumah tersebut)', to loiter around. Apart from 'Zahid', SP3 had also seen a woman with a child of five years, who had stayed in the house. SP3 had further testified that when the accused paid the rent through him ('SP3'), the accused told him (SP3) that the rent money was given by 'Zahid'. SP3 had also affirmed that the accused was not the tenant of the house, but it was 'Zahid'. Hence, this court had found that 'Zahid' was not a fictitious character. SP3 had also confirmed that on the night of the arrest, when SP3 had heard the door of the house ('D46') being smashed opened, followed by the shouts 'Polis!, Polis!', SP3 had also heard the sound of broken glasses coming from the back of the house.

[16] SP4 (Puan Norhayati, the house-owner) had testified that she was the owner of the house and that she rented it out to a person by the name of 'Zahid' in February 2014 (ie two months before the arrest). 'Zahid' had paid a deposit of RM600. She testified that she had instructed 'Zahid' to pay the monthly rental at the end of each month through SP3 (Sidek), her neighbour. She had affirmatively testified that only 'Zahid' rented that house, and not the accused.

A She also testified that she did not meet the accused, nor knew him. She had confirmed that when she rented out the house, the glass windows of the back of the house were not broken but was intact. She had confirmed that she did see some fragments of broken glasses near the glass windows in the back of the house (as in exhs P6(N) and (0)), two days after the arrest.

B

[17] Evidence was also led by SP9, ie Che Aziz, who was in the house with another Malay male, by the name of Zakuwan Ariff who, together with the accused, were all arrested on the night of 14 April 2014. This was confirmed by SP7 and the police report he had made ('exh P16').

C

[18] According to SP9, the accused did not stay in that house ('D46') but instead stayed in another house behind Sekolah Menengah Geting, Tumpat. SP9 too did not stay there ('D46') and neither did Zakuwan. SP9 had affirmatively testified that 'Zahid' was the tenant of the house.

D

[19] SP9 under cross-examination, had also testified that, at the time when the police ambushed the house, 'Zahid' was also in the house together with them. However, 'Zahid' managed to make a quick escape through the glass windows of the back of the house by smashing them (see the photographs P6(N)–P6(O)).

E

[20] SP9 had also testified that the police team had told him that 'Zahid' had managed to escape from the house. According to SP9, 'Zahid' was detained in Machang prison for drugs related activities.

F

[21] During the trial, Zakuwan was not called to give evidence even though he was offered as a witness to the defence. Zakuwan was, at first jointly charged with the accused and with SP9, for the suspected crime in the instant case, at the magistrates' court, but the prosecution proceeded to charge only the accused in this court ('the charge sheet Folio D25'). 'Zahid' was also not charged.

G

H **[22]** It was the defence's case that the heroin did not belong to the accused. From the totality of the evidence adduced by the prosecution, this court had concluded that the heroin was accessible to many persons. It was accessible to the following persons:

I (a) 'Zahid', from the evidence of SP4 (the house-owner) was the actual tenant of the house. Evidence of SP4 was supported by SP3. 'Zahid' was not called by the prosecution to give evidence;

(b) Zakuwan, who was earlier, jointly charged, with the accused, together with SP9 ('Che Aziz'), and later released, was not called to give evidence;

(c) the many friends of 'Zahid' who had frequented to loiter around in the house who, understandably, were not called as witnesses to give evidence;

(d) SP9 himself;

(e) the woman and the child who were also not called to give evidence; and

(f) the accused himself.

[23] At the end of the prosecution's case, this court, after a thorough scrutiny, by subjecting all the evidences adduced by the prosecution to a maximum evaluation, had found that the prosecution had failed to establish a prima facie case. Thus, the accused was ordered to be acquitted and discharged without calling for his defence, the main ground being that the prosecution had failed to exclude the possibility of access by others to the heroin in question.

The legal principle of the need to exclude accessibility to the drugs by other persons

[24] Indeed it is a settled principle of law that in having to prove its case, the prosecution, and not the accused, has a duty to exclude the possibility of accessibility by other persons to the drugs in question. This has been confirmed by the apex court, time and again, the latest being the Court of Appeal in *Karthi a/l Gopal v Public Prosecutor* [2016] 5 MLJ 274.

[25] In that case, there was evidence that there were two other persons who stayed in the house where the drugs were found, ie Nelson and his wife Jennifer, and another person. They were not called to testify. In allowing the appeal, the Court of Appeal speaking through Aziah Ali ('JCA') had ruled, as found in headnote 2:

> The admission of the respondent's witness, SP6 that from her investigation a married couple also stayed in the house and the presence of the DNA of another person on the t-shirt hung behind the door where the drugs were found lend credence to the appellant's version that the said room was accessible to others. It is settled principle of law that the prosecution has a duty to exclude the possibility of access by others to the drugs. In the present case, the respondent had failed to prove its case beyond reasonable doubt as the possibility of access by Nelson and Jennifer had not been excluded, which in turn rendered the conviction of the appellant unsafe (see paras 26–28).

[26] In the Court of Appeal case of *Public Prosecutor v Ang Kian Chai and another appeal* [2012] MLJU 158; [2012] 4 MLRA 456, the prosecution had failed to call one Chen Jing, a tenant of a house, who was present during the police raid. Evidence was led that she together with her husband, Goo Aik Hung, and their child, had stayed in the house. None of them were called to give evidence. Only her statement was recorded under s 112 of the Criminal

Procedure Code. Even worst was that the statement was not tendered. The Court of Appeal found this omission to be fatal. Abdul Malik Ishak JCA (as he then was) observed as follows:

> [28] The factual matrix showed that the appellant *was not alone* in the said house when SP4 and his police party gained access inside the said house. Chen Jing and a child of about four years old were also there — inside the said house. Yet, the learned JC invoked the presumption under s 37(d) of the DDA against the appellant and found him to be in possession of the raw opium. In our judgment, before the learned JC could invoke s 37(d) of the DDA against the appellant the prosecution ought to have excluded Chen Jing from having custody or control of the raw opium at the material time. This exclusion can only be achieved if the prosecution were to call Chen Jing as a witness or if the prosecution were to tender the s 112 statement of Chen Jing. Alas, all these were not done. The Federal Court in *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113 held that the non-tendering of the statement of the owner of the vehicle or the failure of the prosecution to call the owner of the vehicle as a witness raised the pertinent question of who was in actual control of the vehicle immediately prior to the date of arrest. The Federal Court also held that it was the duty of the prosecution to exclude the possibility that other individuals could not have had custody or control of the vehicle immediately prior to the date of arrest. Now, applying the principles in that case to the present appeal at hand, we categorically say that the prosecution had failed to exclude the possibilities that Chen Jing or even Chen Jing's husband (Goo Aik Hiang) or even Khoo Teck Huat whose name was on the water bill of the said house could have had custody or control or access to the raw opium.
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> [29] It is trite law that the onus is not on the appellant to prove the possibility of access to the raw opium by others but rather that onus falls on the prosecution to prove to the court that others could not possibly had access to the raw opium. To put it in another way, it is the duty of the prosecution to exclude such possibility and to prove that the appellant had exclusive possession of the raw opium (*Abdullah Zawawi Yusoff v Pendakwa Raya* [1993] 3 MLJ 1; [1993] 4 CLJ 1).

[27] In the Federal Court case of *Ibrahim Mohamad & Anor v Public Prosecutor* [2011] MLJU 1491; [2011] 4 CLJ 113, where the drugs were found in the car, the Federal Court said:

> [9] It is our finding that there is no evidence to prove that both the accused were exclusively in custody and control of the vehicle prior to their arrest. There are so many favourable inferences that can be made from the existing factual matrix of this case. The vehicle could have been previously rented to a third party or Zainuddin could have taken possession of the said vehicle after the summons incident in Kedah. All these inferences which are favourable to both the accused were never considered by the High Court and the Court of Appeal. These inferences have the effect of casting reasonable doubt on the element of custody and control. The failure on part of the courts below to consider this issue in our view is a misdirection in law.
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> [10] Whilst it is not denied that the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it has a duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution's case. This was not

done in the present case. The question as to how the vehicle came into the custody and control of both the accused still remains unanswered. We are of the view that Zainuddin being the registered owner of the vehicle is the one who holds the key to the unfolding of events, without which there are gaps in the prosecution's case (see the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1).

[28] In *Husin bin Sitorus v Public Prosecutor* [2012] 3 MLJ 782; [2012] 7 CLJ 205 the prosecution did not exclude the three men who were sleeping in the wheel house of the boat at the time of the police raid. The Court of Appeal had ruled that there was no prima facie case, and on the need to exclude, Azhar Ma'ah JCA (as he then was) said:

[15] There is a welter of authoritative precedents which have held that for possession to be established, accessibility by others to the place where the drugs are found should be excluded by evidence by the prosecution (*Public Prosecutor v Kang Ho Soh* [1991] 3 CLJ 2914; [1991] 3 CLJ Rep 557 (HC), *Public Prosecutor v Tang Chew Weng* [1969] 1 LNS 141 (HC). The onus is not on the defence to prove possibility of access by others but on the prosecution to exclude such possibility and the issue must be answered in favour of the appellant if there were more than one way in which the evidence adduced by the prosecution might be viewed such as in the present case, implicating the appellant or the other persons who were present in the boat (*Abdullah Zawawi Yusoff v Public Prosecutor* [1993] 4 CLJ 1 (SC)). In other words exclusivity of custody and control of the drugs ought to be established by the prosecution.

[29] In the case of *Azizan bin Yahaya v Public Prosecutor* [2013] 1 MLJ 180; [2012] 8 CLJ 405, the illegal drugs were found in the room occupied by the appellant and his wife. At the same time the said room was also accessible to the other occupants of the house who were the appellant's children. The prosecution did not call them but offered them to the defence. On the need to exclude Aziah Ali JCA, said:

[8] We find from the evidence adduced by the prosecution that though the room where the drugs were found was occupied only by the appellant and SP4 but it is pertinent to note that evidence also showed that the room was accessible to all the other occupants in the house. SP4 testified that she and the appellant occupied the main bedroom and the children occupied the other two rooms. In cross-examination SP4 agreed that everybody in the house had access to the room (p 28 appeal record). The room was unlocked. Thus whilst the occupants of the room were the appellant and SP4 both of whom would have had complete access to the room, it is also apparent that their three children too had access to the room. Yet SP4 was not charged although she was remanded.

[9] We find that the testimony of SP4 regarding access to the room was hardly challenged. SP5 under cross-examination had also agreed that the appellant's children probably had access to the appellant's room. He was not re-examined on this issue. We agreed with learned counsel that the learned judge had failed to

analyse or assess these testimonies. The prosecution has failed to discharge its bounden duty of excluding access to the appellant's room by others.

[30] The views of Her Ladyship were adopted by Balia Yusof JCA in *Mohamad b Abdul Rahman v Public Prosecutor* [2013] MLJU 1592; [2013] 7 CLJ 843. In that case, the room where the drugs were found was not locked and was accessible to all and 'not within the exclusive domain of the appellant'. After referring to the duty to exclude referred to in *Azizan Yahaya* His Lordship said:

> [25] We find that in the instant appeal the prosecution had failed to discharge that duty. We are reminded of the Federal Court's decision in *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1 and wish to reiterate what was stated by Edgar Joseph Jr FCJ at p 440 (MLJ); pp 6–7 (CLJ):
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> > ... while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial ... it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation, which is nothing less than a statutory duty, the accused must be acquitted.
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> [26] Likewise, the appellant in the instant appeal ought to have the benefit of the prosecution's failure.

[31] In *Lean Siew Boon & Anor v Public Prosecutor* [2014] 2 MLJ 572 the prosecution did not exclude Koay Gim Bee, whose insurance policy was found in the condominium unit where the drugs were recovered. Speaking for the Court of Appeal, Tengku Maimun bt Tuan Mat JCA said:

> [25] In the circumstances, we agree with the appellants that there is a gap in the prosecution's case which had not been bridged (see *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16).The onus is not on the defence to prove the possibility of others having access to the said unit but on the prosecution to exclude such possibility (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). We find that the learned trial judge had seriously misdirected himself on this issue when His Lordship said:
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> > This court views that the mere fact that there is evidence of access by other person or persons (leaving aside the accused persons/persons) to the premises or apartment unit where drugs and/or drug processing paraphernalia are found does not necessarily mean that there is a possibility such person or persons would have some form of involvement in the incriminating exhibits there.
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> > This is because it is a known fact of life that it will inevitably happen that certain categories of people will drop by any premises or apartment units and so forth like family siblings, friends, relatives, office colleagues, plumbers, television repairman, water and electricity meter readers etc at certain period. Therefore if such access occurs, it must be shown that there is an involvement in the incriminating exhibits in order to exculpate an accused. In the instant case, the

prosecution had shown that there was no possibility of access by others to the unit. It must be borne in mind that both the accused persons lived on the 16th floor and therefore in close proximity to the 30th floor in the same block. Thus any attempt to gain unlawful access to the unit would sooner or later draw the attention of the first and second accused persons to such presence.

[32] Last but not least, in the case of *Mazlani bin Mansor v Public Prosecutor and other appeals* [2014] 2 MLJ 18 the defence contended that one Suratman, the worker and friend of the first accused had a key to the premise where the proscribed drugs were found, thus raising the defence that Suratman had access to the drugs as well. Suratman was not called to give evidence. The High Court convicted the accused and the conviction was affirmed by the Court of Appeal. However, on appeal to the Federal Court, the decision was overturned based on the issue of accessibility.

Other infirmities of the case of the prosecution

[33] In addition, this court had found other infirmities of the prosecution's case which strengthened further the defence of the accused.

[34] Firstly, the evidence of SP9 that proved the existence and the role played by 'Zahid'. Although called by the prosecution SP9, who was arrested together with the accused, and with one Zakuwan, had given favourable evidence for the accused under cross-examination. It might just well be that his evidence was the actual truth, as he had given evidence under oath that, whatever he had testified was the truth, nothing else but the truth. His evidence was that 'Zahid' was the tenant of the house, and that 'Zahid' was together with them in the house at the time of the raid, but he had managed to escape through the glass windows of the back part of the house, thus demolishing the case of the prosecution.

[35] SP9's evidence was supported by the independent evidence of SP3 and SP4. SP3 had said that, after he heard the sound of the front door of the house was smashed opened and shouts of 'Polis!, Polis!', it was followed by the sounds of broken glasses coming from the back of the house. SP4 had testified that, after the incident, she had visited the house and had seen some fragments of broken glasses of the back glass windows. Both SP3 and SP4 testimonies lend credence to SP9's evidence that 'Zahid' was in the house at the time of the raid, but managed to escape from the police, through the glass windows of the back of the house.

[36] Hence, this court had made a firm finding that 'Zahid' was proven not to be a fictitious character. Hence, it can be inferred that in all probabilities, the heroin indeed belonged to 'Zahid'. This had further strengthened the accused's defence.

[37] Secondly, the arrest and detention of the accused was based on an information received, of which this court had to be cautious, as there was always the possibility that the drugs were planted. In this respect, it is germane to state the decision of the Federal Court in the case of *Ibrahim Mohamad & Anor*:

> [12] The Supreme Court in Abdullah Zawawi had therefore highlighted the danger of relying on a tip-off's case as there is a possibility that in such a situation the drugs may have been planted in order to implicate the accused. Hence the need for the prosecution to exclude the possibilities that other individuals may have access to the drugs in question. We find on a proper perusal of the evidence it would show that the prosecution had failed to exclude the possibility of others having access to the said vehicle. No evidence whatsoever was adduced by the prosecution to exclude the possibility that Zainuddin and/or other individuals had access to the vehicle prior to the date of arrest. This is further compounded when the courts below erroneously took the position that the failure to call Zainuddin is not fatal as he was not together with both the accused when they were arrested. We also noted even Zainuddin's statement that was taken from him was not adduced and tendered as evidence pursuant to s 32(1)(i) of the Evidence Act 1950 if at all for some valid reasons Zainuddin could not be called to give evidence.

[38] Thirdly, SP7 ('the complainant/arresting officer') had testified that, parked under the porch by the house was a Kancil motorcar with the registration No DAT 628, a 'LC' motorcycle with the registration No WKN 16 and another motorcycle with a registration No Narathiwat 45. From ID D27, the Kancil motorcar was registered under the name of Wan Mohd Khairi Wan Ismail. There were also seven mobile phones confiscated from the house. According to SP7 all these items were handed over to the forfeiture of property unit ('FOP') and the investigating officer was ASP Abdullah. ASP Abdullah was not called to give evidence. The failure of the prosecution to call ASP Abdullah to testify had deprived the defence of the opportunity to inquire from him the ownership of the seven mobile phones, the car and the motorcycles, all of which in themselves had proved that there were several other persons who were in the house at the time of the raid, or who had stayed in the house. These facts had not only weakened the prosecution's case, but had strengthened the defence's case, as well as had raised an adverse inference against the prosecution under s 114(g) of the Evidence Act.

[39] Finally, 'Zahid', Zakuwan, and 'the woman' were persons who had access to the house (apart from the many friends of 'Zahid'). They were not called to testify, and this deprived the defence of the opportunity for

cross-examination. No reasonable explanations were given by the prosecution for the omission to call those persons as witnesses. As such, this failure on the part of the prosecution had raised an adverse inference against it under s 114(g) of the Evidence Act 1950. Hence, the defence ought to have the benefit of the prosecution's failure.

CONCLUSION

[40] From the authorities referred to in which are held that, the failure by the prosecution to exclude the accessibility to the drugs by other persons render it fatal to the prosecution's case, for to sustain a conviction in such a case would be unsafe, and thus invalid. Similarly in this case too, this court had found that the heroin found in D46 were accessible to many persons who were not called to give evidences resulting in the failure of the prosecution to prove a prima facie case. In the upshot, this court ordered the accused be acquitted and discharged without his defence being called.

Accused acquitted and discharged without calling for his defence.

Reported by Ashok Kumar